No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1925

WESTERN PAPER MAKERS' CHEMICAL COMPANY AND TANGLEFOOT COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLEES

BRIEF FOR INTERSTATE COMMERCE COMMISSION

P. J. FARRELL,
R. H. KELLY,
For Interstate Commerce Commission.

MARCH, 1926.

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STATEMENT

The citation of the decision of the lower court in this case is 7 F. (2d) 164.

This is an appeal from a final decree of the United States District Court for the Western District of Michigan, Southern Division, denying the injunction asked for by appellants and dismissing the petition; and the matters complained of arose out of action taken by the Interstate Commerce Commission in a proceeding entitled Investigation and Suspension Docket No. 1900. The proceeding covered rates on rosin and other naval stores from points of origin south of the Ohio River, including south Atlantic and gulf ports to destination points

north of the river, including Kalamazoo and Grand Rapids, Mich., Chicago, Ill., and Milwaukee, Wis. Appellants' complaint, however, is confined to the rates on rosin to Kalamazoo and Grand Rapids as compared with the rates on that commodity to other destination points, particularly Chicago and Milwaukee.

The proceeding was instituted by the Commission on its own motion pursuant to protests against the rates mentioned, included in tariffs filed in the Commission's office by carriers engaged in the transportation of naval stores between the aforesaid points of origin and destination, and the matters complained of are covered by the Commission's report and order of March 5, 1924, 87 I. C. C. 740, as modified by the Commission's report and order of June 18, 1924, 89 I. C. C. 634 (Rec. 9–33, 35–40).

In its report of March 5, after stating that the rates filed by the carriers as aforesaid constituted a comprehensive revision of the rates on naval stores from all points of production (Rec. 10), the Commission made pertinent findings and statements as follows:

> We find that the proposed rates on naval stores from southeastern and Mississippi Valley, and Carolina territories to the destinations in the suspended schedules have not been justified. An order will be entered requiring the respondents to cancel the suspended schedules.

We further find that just and reasonable rates for the future from Jacksonville and points in Atlanta subterritory, and from New Orleans, and points in Montgomery subterritory and Mississippi Valley territory to representative destinations will be those set forth below:

	From Jacksonville		From New Orleans	
	Rosin	Turpentine	Rosin	Turpentine
	Cents	*Cents*	*Cents*	*Cents*
Cincinnati	33	52	33	52
Louisville	33	52	32	51
Cairo	33	52	28	44
St. Louis	37	58	31	49
Memphis	31	49	25	40
Nashville	30	47	30	47
Chicago	40	63	37	58
Kalamazoo	40	63	39	63
Milwaukee	41	64	38	60
Grand Rapids	41	64	40	63
Cleveland	39	62	40	63
Detroit	40	63	40	63
Columbus	37	58	37	58
Indianapolis	37	58	36	57
Buffalo	42	66	43	67

The record does not afford a sufficient basis for prescribing rates from Carolina territory. Rates should be published in harmony with those prescribed from the Southeast.

Rates to other points in central territory should be made with relation to the rates to the points herein set forth.

* * * * *

We find that reasonable rates from points in Florida on the Perry branch of the Atlantic Coast Line Railroad will be rates 3

cents on rosin and 6 cents on turpentine higher than the rates from Jacksonville, and that reasonable rates from other points in Florida south of the Jacksonville-River Junction line of the Seaboard Air Line will be rates 5 cents on rosin and 10 cents on turpentine higher than the rates from Jacksonville. (Rec. 26–27.)

* * * We find that the rates from points on the short-line railroads from which higher rates are proposed in the suspended tariffs should not exceed the rates contemporaneously in effect from junction points of such lines with the trunk lines by more than 3 cents on rosin and 6 cents on turpentine. (Rec. 28.)

We are not to be understood as here prescribing the grouping of points of origin, but we merely approve the grouping proposed by respondents and prescribe reasonable rates from the groups. Our findings in this case are based upon the record before us and are without prejudice to any different conclusions which may be reached upon a different showing with respect to the entire adjustment or rates to particular points.

Except in comparatively few instances, no justification was offered for the continuance of fourth-section departures. The portions of such applications which seek relief from the provisions of the fourth section with respect to rates on naval stores will be denied. This denial will not be made effective until May 20, 1924. In specific instances where carriers believe there is a reasonable ground

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for the continuance of fourth-section departures, applications may be filed showing specifically and in detail the departures sought to be continued and the reasons therefor.

An order will be entered requiring the cancellation of the suspended schedules. No order prescribing the rates herein found reasonable will be entered at this time. The respondents will be expected to establish such rates on or before May 20, 1924. If this is not done, we will enter an appropriate order. (Rec. 29.)

The body of the order of March 5 reads:

It appearing, That by orders dated August 30, 1923, and September 17 and 18, 1923, the Commission entered upon a hearing concerning the reasonableness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until January 29, 1924, and that the operation of said schedules was voluntarily deferred by respondents herein until March 29, 1924;

It further appearing, That a full investigation of the matters and things involved has been had, and that the division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel such schedules as are now

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under postponement, on or before April 15, 1925, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act. (Rec. 33.)

The modification referred to is shown by the order of June 18, 1924, the body of which is as follows:

It appearing, That on March 5, 1924, the Commission entered its original report in the above-entitled proceeding; that a petition has been filed on behalf of respondents for modification of the findings in said report; and the Commission having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the findings in the original report, 87 I. C. C. 740, be, and they are hereby, modified to provide that rates from Pensacola, Fla., and points in Montgomery subterritory to Memphis, Tenn., shall not exceed 28 cents per 100 pounds on rosin and 44 cents per 100 pounds on turpentine; that the rates to Milwaukee, Wis., shall not exceed 42 cents per 100 pounds on rosin and 66 cents per 100 pounds on turpentine from Jacksonville and Atlanta subterritory and 39 cents per 100 pounds on rosin and 62 cents per 100 pounds on turpentine from New Orleans and points in Montgomery sub-

territory and Mississippi Valley territory; and that the rates from points in Montgomery subterritory on and east of the lines of the Central of Georgia and Louisville & Nashville Railroads from Columbia, Ala., to Crestview, Fla., to points of destination here under consideration shall not exceed the rates from points in Atlanta subterritory to the same destinations. (Rec. 40.)

It will be observed that the modifications, so far as material here, simply increased the rates per 100 pounds on rosin to Milwaukee from 41 cents to 42 cents from Jacksonville and Atlanta subterritory, and from 38 cents to 39 cents from New Orleans and points in Montgomery subterritory and Mississippi Valley territory.

The relief asked for by appellants as shown in paragraphs 2 and 3 of the prayer of their petition is:

2. That a temporary and a permanent injunction issue restraining the order of the Interstate Commerce Commission establishing the said tariff so far as it relates on the through rate of rosin to the cities of Kalamazoo and Grand Rapids, Mich.

3. That a decree be made modifying the order of the Interstate Commerce Commission in part so far as the same relates to the establishment of a through rate on rosin from points south of the Ohio River to points in States north of the Ohio River. (Rec. 8–9.)

The final decree denying the injunction asked for by appellants and dismissing the petition is dated January 3, 1925 (Rec. 61), and the points relied upon in this court by appellants are:

> 1. That there was no evidence before the Interstate Commerce Commission from which the Interstate Commerce Commission could fix the through rate on rosin from points of origin to the cities of Kalamazoo and Grand Rapids, Mich., as fixed by said Commission in its findings, a copy of which is attached to the Bill of Complaint.
>
> 2. That the through freight rates on rosin from points of origin to Kalamazoo and Grand Rapids, Mich., are unjustly discriminatory and violative of the " long-and-short-haul " clause, section 4, of the Interstate Commerce Act, * * *. (Rec. 155.)

ARGUMENT

I

The Commission's orders of March 5 and June 18, 1924, are justified by the findings in its reports of those dates, and the findings are fully supported by the record upon which they are based.

We have seen that the order of March 5 simply required the carriers to cancel the increased rates on rosin and other naval stores they had attempted to put in force, and that the order of June 18 was a benefit to the appellants, because it authorized an increase to the extent of 1 cent per 100 pounds in the rates on rosin to Milwaukee and did not authorize any increase in the rates on that com-

modity to either Kalamazoo or Grand Rapids. It is therefore difficult to understand how, consistently, the court can comply with appellants' request for an injunction restraining enforcement of the orders, or of either of them, in so far as they relate to the rates on rosin to the latter two cities, or to any other points of destination north of the Ohio River.

Appellants' complaint, however, does not relate to any requirement contained in either of the orders mentioned, but is confined instead to increases in the rates on rosin authorized by the Commission in its report of March 5, as modified by its report and order of June 18; and for the purpose of showing the increases thus authorized we quote from the decision of the lower court as follows:

> The Commission's order here attacked was made as the result of a suspension proceeding ordered by the Commission because of protests by producers and dealers in and shippers of naval stores, including plaintiffs, against a proposed comprehensive revision by carriers, in both the Southeastern and Mississippi Valley territory, of the rates on naval stores from all points of production. By the then prevailing tariffs, the rates from all South Atlantic ports to a given destination were the same, regardless of specific origin, some through rates being published to certain points in certain territory, made up of the local rate to the Ohio River plus a "specific" published by the line north of the river. * * *

By these tariffs the rate on rosin to Cincinnati was 27 cents per 100 pounds; to Chicago, 39 cents from South Atlantic and 30 cents from Gulf ports; to Detroit, 39.5 cents from South Atlantic and 33 cents from Gulf; to Louisville, 27 cents from South Atlantic and 24.5 from Gulf; to Milwaukee, 44.5 cents from South Atlantic and 33 cents from Gulf; to Kalamazoo, 39 cents from South Atlantic and 34.5 from Gulf; to Grand Rapids, 44.5 from South Atlantic and 34.5 from Gulf. * * * * (Rec. 53-54.)

Upon full hearing, to which both plaintiffs were parties, the Commission found the proposed new rates not justified, ordered a cancellation of the suspended schedules, and found the following to be just and reasonable rates for the future from South Atlantic and Gulf ports, respectively: Cincinnati, 33 cents; both routes; Chicago, 40 cents and 37 cents; Milwaukee, 41 cents and 38 cents; Kalamazoo, 40 cents and 39 cents; Grand Rapids, 41 cents and 40 cents; Detroit, 40 cents by both routes (87 I. C. C. 754). The rate to Milwaukee was later made 42 cents and 39 cents, thus making the South Atlantic rate to Kalamazoo the same as to Chicago and Detroit, and the rate to Grand Rapids 1 cent less than to Milwaukee; and from the Gulf the rate to Milwaukee 2 cents higher than to Chicago, and to Grand Rapids 1 cent higher than to Milwaukee (89 I. C. C. 637; 91 I. C. C. 226). It is these rates to Kalamazoo and Grand Rapids, so found by the Commission to be

just and reasonable, which the bill before us seeks to set aside. (Rec. 55.)

Plaintiff's main contention, broadly stated, is that there was no evidence before the Commission supporting the rates to these two cities as so finally fixed. (Rec. 56.)

However, appellants' contention that there is no evidence in the record which supports the Commission's finding that the rates prescribed by it for the transportation of rosin to Kalamazoo and Grand Rapids are reasonable is confined within limits narrower than those above indicated. In this connection pertinent and material statements made by the lower court, and not assigned as errors by apellants, are as follows:

* * * The entire record before the Commission is in evidence.

Plaintiffs concede that on the hearing before the Commission the lines south of the Cincinnati gateway offered evidence tending to show the reasonableness of that portion of the through rate from the points of origin to the river. The testimony so introduced related to both South Atlantic and Gulf ports. The Cincinnati rate therein concerned is the same that the Commission found reasonable, viz, 33 cents. The substantial criticism thus necesarily is that there was no testimony sustaining the specifics north of the river or of the rate as a through rate. (Rec. 56–57.)

We have seen that the increase made by the Commission in the rate on rosin from points of origin to the river crossing, namely, Cincinnati, was 6 cents per 100 pounds, and if this 6-cent increase were added to the rates on rosin to Kalamazoo and Grand Rapids which were in effect prior to the time when the aforesaid revision was made by the carriers the rates to Kalamazoo and Grand Rapids would be, respectively, 45 and 50.5 cents from south Atlantic ports and 40.5 cents from Gulf ports, while the rates prescribed by the Commission for the transportation of rosin to Kalamazoo and Grand Rapids are, respectively, 40 and 41 cents from south Atlantic ports and 39 and 40 cents from Gulf ports. It thus appears that the Commission did not make any increases in the specifics to be added to the rates to Cincinnati for the purpose of making through rates to Kalamazoo and Grand Rapids, and since no increases were made in the specifics no evidence was necessary to justify increases.

What is said above shows plainly, we submit, that appellants' contention concerning the absence of evidence upon which to base the rates prescribed by the Commission for the transportation of rosin to Kalamazoo and Grand Rapids has no foundation upon which to rest, and also establishes that there is no merit in appellants' assignment of error No. 2, which is to the effect that the lower court erred in treating as evidence the Matthews exhibits numbered 85 and 86 (Rec. 140–141) which were

introduced into and made a part of the record before the Commission for the purpose of showing chronologically the history of specifics applied to the transportation of rosin and turpentine north of the Ohio River during a comparatively long period of years.

In refutation of appellants' contention concerning the absence of evidence in the record before the Commission, the lower court further said:

> * * * But while we are cited to no direct testimony of the reasonableness of any one through rate or specific, there was testimony tending to show that the suspended rates from Ohio River crossings north, on the basis of rates south of the river as factors, were reasonable; * * * And we think that for this and other reasons there can not be said to be an absence of competent evidence thereof. It affirmatively appears that the specifics with which we are concerned north of the river are substantially less than the " specifics " or proportionals in actual use for a substantial period prior to the proposed revision which was the subject of the suspension proceeding. For example: Kalamazoo's old South Atlantic rate of 39 cents was 12 cents above the then river rate of 29 [27] cents. By the 40-cent southeastern rate to Kalamazoo which the Commission adopted the specific is but 7 cents above the new river rate. By the old Gulf schedules Kalamazoo's rate of 34.5 cents was 4.5 cents above Chicago and

7.5 cents above Cincinnati, while her new rate of 39 cents is but 2 cents above Chicago and 6 cents above Cincinnati. Grand Rapids' old South Atlantic rate of 44.5 cents was 17.5 cents above the River rate, while her new rate is but 8 cents above the River rate. Her old Gulf rate of 34.5 cents was 4.5 cents above Chicago and 7.5 cents above Cincinnati, while her new Gulf rate is but 3 cents above Chicago and 7 cents above Cincinnati. The increases of Kalamazoo's rates by both routes and of Grand Rapids' Gulf rate were thus not only due entirely to the increases of rates to the river and (apparently) to Chicago especially, but represented an actual decrease of specific. As has already appeared, Grand Rapids' South Atlantic rate is 3.5 less than her old rate, while Kalamazoo's South Atlantic rate is but 1 cent higher than her old. (Rec. 57.)

Notwithstanding the above statement of the court to the effect that it had not been cited to direct testimony bearing upon the reasonableness of any one through rate or specific, we will endeavor to show that the record contains a large volume of testimony and other evidence of this character.

The principal witness for the carriers in the proceeding before the Commission was R. J. Doss, assistant general freight agent of the Atlantic Coast Line Railroad Company, who introduced exhibits numbered 1 to 68, inclusive, 87 to 90, inclu-

sive, and 154 and 155. In his Exhibit 24 he compared the all-rail rates suspended by the Commission with the water-and-rail rates, from Savannah and Jacksonville to the destination territory north of the river here involved; in Exhibits 25 to 28, inclusive, he compared the rail rates on rosin and turpentine with the rates on lumber, cotton, vegetables, and oranges, from representative points of origin south of the river to representative points of destination north of the river, and in Exhibit 29 he compared the rates on rosin and turpentine, which are commodity rates, with the class rates which, in the absence of commodity rates, would be applicable to the transportation of rosin and turpentine. (Rec. 80, 129–130.)

Other similar comparisons are contained in Exhibits 38 to 48, inclusive (Rec. 80–82, 131–134), and include comparisons between the rates suspended by the Commission and those applied to the transportation of sulphuric acid in tank cars, petroleum and petroleum products, lubricating oil, scrap iron, hides, and lard compound.

In connection with the comparisons made by him Mr. Doss, among other things, said:

> * * * I feel that this comparison of the actual rates and earnings on rosin with the rates and earnings on lumber from this same territory to the same points of destination is very strong and convincing evidence of the reasonably low character of our proposed rosin rates. (Rec. 82.)

> * * * I have undertaken to compare these suspended rates with the rates on other commodities and revenue on other commodities, selecting practically every variety of commodity that could be found that moves in this territory, and in comparison with the rates and revenues on other commodities I feel that the rates as proposed in this suspension are reasonably low rates. * * *. (Rec. 83.)
>
> In the short time we had it was not possible to deal with every origin and with every destination. We took what we consider, and what I think are, fairly representative points. (Rec. 87.)

We do not deem it necessary to set forth in full the evidence in the record bearing upon the question of reasonableness, but think best to call the attention of the court to the fact that, in addition to comparisons between rates from representative points of origin south of the Ohio River to representative points of destination north of the river, the Commission had before it representative distances, car-mile earnings, etc., as well as the history of rates on rosin and turpentine and comparisons of earnings on many different classes of traffic. We call particular attention to Exhibits 6 to 13, inclusive, 16, 17, 20, and 46 to 50, inclusive. (Rec. 126–128, 133, 134.) In connection with some of the comparisons, the Commission, among other things, said:

> The proposed rates were compared with the rates from the same points of origin to eastern trunk-line destinations and, for similar distances, are lower. * * * (Rec. 18.)
>
> Other comparisons were made with the rates from southern points to northern destinations on glucose, sulphuric acid, alcohol, petroleum, peanuts, cottonseed oil, scrap iron, hides, lard compound, tallow, lumber, and other commodities of which there is a substantial movement. (Rec. 19.)

In speaking of the rates to Grand Rapids, Mr. Doss made statements and answered questions as follows:

> I have been aware of the existence of this complaint and insistent complaint, upon the part of the destination interests in respect to certain alleged maladjustments and unreasonableness of rates, and still, I do not here set up any comparisons at Milwaukee and Grand Rapids.
>
> I think, however, that comparisons showing Kalamazoo and Chicago are fairly representative. I know what the rates are to Grand Rapids and to Milwaukee. They are shown in the tariffs.
>
> * * * * *
>
> Q. However, so far as this case is concerned, do I understand that you are not offering any defense of the proposed rates to Grand Rapids?
>
> A. I think I am defending them.

Q. Where is your defense?

A. All th-ough [through] my testimony has been defense.

Q. Not in respect to Grand Rapids. Where is your defense of Grand Rapids? I am asking you specifically about that.

Q. [A.] My whole testimony has dealt with the rates to Grand Rapids and the rest of these destinations.

Q. Your testimony has dealt with the rates to other points, but it has not dealt with the rates to Grand Rapids and Milwaukee, in any substantial measure?

Q. [A.] The situation at Grand Rapids is not any different from what it is at the other Michigan points.

Q. Do you know that to be a fact?

A. The rates speak for themselves. The exhibit shows the rates.

Q. Where are the rates? There are no rates to Grand Rapids, and that is why I am asking you. Where is your defense here? If you have not any, just say so, and that will satisfy me.

* * * * *

[A.] I want it clearly understood that there was no ulterior motive in selecting Kalamazoo and Chicago and not selecting the others. It is humanly impossible to take all these points. The rates will show for themselves, and I think what I have said about Kalamazoo is equally applicable to Grand Rapids. (Rec. 87, 88.)

In view of the foregoing, we find it difficult to understand how, consistently, it can be contended

that the rates prescribed by the Commission, and complained of by appellants, are not based upon substantial evidence.

II

The rates prescribed by the Commission for the transportation of rosin to Kalamazoo and Grand Rapids are neither unjustly discriminatory nor in violation of section 4 of the interstate commerce act.

We do not deem it necessary to discuss separately appellants' contention that the rates prescribed by the Commission for the transportation to Kalamazoo and Grand Rapids are unjustly discriminatory, for the reason that the contention, according to our understanding, is based upon appellants' further contention that the rates to those two cities are in violation of the prohibition against a greater charge for the shorter than for the longer haul, contained in section 4 of the interstate commerce act. The lower court described the contentions and stated the reasons why they can not be sustained as follows:

> * * * By plaintiffs' brief in this court the charge of discrimination is, at best, faintly presented. The bill alleges generally that rates from the Gulf ports to Kalamazoo are higher than from the same point of origin to Chicago, although the latter is the longer haul; that the rates from Mississippi Val-ey [Valley] territory to Grand Rapids are higher than the rates from the same points of origin to Milwaukee, " which is a

longer haul"; and, more specifically, that the rate to Cincinnati was described by the carriers at the suspension hearing to be the key rate to the territory beyond; that the distance from Cincinnati to Kalamazoo is less than to either Chicago or Milwaukee, and from Cincinnati to Grand Rapids less than to Milwaukee; that transportation conditions to Kalamazoo and Grand Rapids were not shown to be less favorable than to Chicago and Milwaukee, and thus that Kalamazoo is directly intermediate to Chicago and Milwaukee, and Grand Rapids directly intermediate to Milwaukee by way of various worked and workable routes. It will be observed that no charge of discrimination in South Atlantic rates is made. Indeed, that rate to Kalamazoo is the same as to Chicago and Detroit, and 2 cents less than to Milwaukee, and to Grand Rapids is 1 cent less than to Milwaukee. From the Gulf territory, however, Kalamazoo's rate is the same as Milwaukee's, viz, 1 cent less than Detroit's, but 2 cents higher than Chicago's; and Grand Rapids' rate is 1 cent higher than Milwaukee's. But the direct and logical route from Cincinnati to Kalamazoo and Grand Rapids does not pass through either Chicago, Milwaukee, or Detroit. Nor does the direct and logical route from Chicago to Milwaukee pass through either Kalamazoo or Grand Rapids. Moreover, by one of the comparative earning schedules before referred to, the distance from Mobile to the points involved here were: To Cincinnati,

750 miles; Chicago (which is nearly 300 miles from Cincinnati), 858 miles; Milwaukee, 943 miles; Kalamazoo, 963 miles; Grand Rapids, 1,011 miles, and Detroit 1,021 miles. The Commission found that because of the absence of routing instructions Kalamazoo and Grand Rapids are technically intermediate to Chicago, Detroit, and Milwaukee by possible routes, although the record indicates that actual movement over such routes would be unusual. (91 I. C. C. 225.)

The Commission further found that the Illinois Central controls the rates from New Orleans to Chicago, and hence to Milwaukee, and that other carriers serving New Orleans and the other Gulf ports meet the New Orleans-Chicago rate so made (91 I. C. C. 226). We think that neither these findings nor the basing of the Mississippi Valley rate to Milwaukee upon the Chicago rate can be pronounced arbitrary or beyond the Commission's authority. It seems clear that by neither the old nor the later suspended Gulf port tariffs was the rate to Cincinnati regarded as the key rate for Chicago and Milwaukee. The charge of discrimination therefore can not be sustained. *Seaboard Air Line Ry.* v. *United States,* 254 U. S. 57-62. We see no basis for the contention that the rates established by the Commission violate the fourth section of the act. The Commission found that the suspended rates did have that effect, and in cancelling those rates and ordering new rates denied applications for relief from fourth section depar-

> tures, with leave later to apply for relief where ground should exist therefor (87 I. C. C. 756); and in modifying the rate from Milwaukee as before referred to, by reason of a charge of discrimination as against Kalamazoo and Grand Rapids, permitted—without requiring—the carriers to keep open routes from points in the eastern portion of the New Orleans group through Grand Rapids to Milwaukee by reducing the Grand Rapids rates from such points (89 I. C. C. 637); and in its later order dismissing plaintiff's complaint, which asked injunction against the rate adjustment (91 I. C. C. 226–227), the Commission said not only that "the new adjustment will result generally in the removal of the existing fourth section departures in the origin territory," but "it is understood that the routing under the new adjustment will be so restricted as to remove the technical fourth section departures with respect to destination points hereinbefore referred to," which were Chicago, Milwaukee, Kalamazoo, and Grand Rapids. (Rec. 58–61.)

It thus appears that in so far as appellant's contentions relate to discrimination and violations of the long-and-short-haul clause of section 4 they are confined to rates on rosin from New Orleans and other Gulf ports to Kalamazoo and Grand Rapids as compared with rates on that commodity from the same points of origin to Chicago and Milwaukee, that is to say, the complaint of appellants

is that the Commission prescribed a rate for the transportation to Kalamazoo which is 2 cents per 100 pounds greater than the rate it authorized for the transportation to Chicago, and prescribed a rate for the transportation to Grand Rapids which is 1 cent per 100 pounds greater than the rate it authorized for the transportation to Milwaukee, notwithstanding that by way of certain routes the distance is greater to Chicago than to Kalamazoo and greater to Milwaukee than to Grand Rapids.

These contentions ignore entirely the fact that the Commission, in its report of March 5, 1924, declined to grant to the carriers relief from the provisions of section 4. In this connection pertinent language used by the Commission is as follows:

> Except in comparatively few instances, no justification was offered for the continuance of fourth-section departures. The portions of such applications which seek relief from the provisions of the fourth section with respect to rates on naval stores will be denied. * * * (Rec. 29.)

In making the contentions, appellants further fail to give effect to the fact that, by way of direct and usual routes, the distance is greater to Kalamazoo than to Chicago and greater to Grand Rapids than to Milwaukee. In this connection witness Doss, among other things, said:

> * * * In working out this revision the carriers followed substantially the existing principle, in other words, the present rates

> from the Mississippi Valley to Chicago are less than combination, also less than the rates to Kalamazoo, and so far as I know, there has never been any definite or fixed relationship in the rates on naval stores to Chicago and those to Kalamazoo and other C. F. A. points. * * *. (Rec. 93.)
>
> * * * Further, Kalamazoo is not intermediate to Chicago on traffic from the Mississippi Valley. Further, that the distance from New Orleans to Chicago is approximately 912 miles, whereas the distance from New Orleans to Kalamazoo is 1,095 miles over the route through Cincinnati, the latter being obtained from the Official Guide, using southern railway distance, 835 miles, to Cincinnati plus 260 miles via the Pennsylvania beyond. Further, the distance from New Orleans to Kalamazoo via Chicago and the Michigan Central is 1,053 miles. In other words, Kalamazoo is not intermediate to Chicago from the Mississippi Valley. * * *. (Rec. 93–94.)

And pertinent language of the lower court was as follows:

> * * * But the direct and logical route from Cincinnati to Kalamazoo and Grand Rapids does not pass through either Chicago, Milwaukee, or Detroit. Nor does the direct and logical route from Chicago to Milwaukee pass through either Kalamazoo or Grand Rapids. * * *. (Rec. 59.)

In its report of June 18, 1924, the Commission stated that if the carriers wish to transport naval stores, including rosin, through Grand Rapids to Milwaukee, they may do so by making such reductions in the rates to Grand Rapids as will enable them to avoid violations of section 4. Language used by the Commission in this connection is as follows:

> * * * If the respondents desire to keep open routes from Pensacola or other points in the eastern portion of the New Orleans group through Grand Rapids to Milwaukee, they will be able to do so by reducing the Grand Rapids rates from such points, but we shall not require them to do so. (Rec. 39.)

It appears to be true also that appellants pay no attention to the fact that the rates for the transportation of rosin to Chicago from Gulf ports are largely controlled by the single-line haul of the Illinois Central. Upon this point witness Doss, among other things, said:

> As to what condition at Chicago makes it necessary or makes it important that we put rates into there on the basis we have put them in.
>
> The existence of the Illinois Central's one-line haul and the fact that they established a rate from New Orleans to Chicago, makes it necessary for us to—it is to enable our shippers to get into Chicago and that sur-

rounding territory on a fair basis with New Orleans. (Rec. 86.)

The Illinois Central Railroad carries a higher rate on naval stores from New Orleans to Kalamazoo than it carries to Chicago. The distance via the route of the Illinois Central to Kalamazoo is substantially greater than the distance to Chicago. (Rec. 87.)

Pertinent language used by the Commission in its report of March 5, 1924, is:

> * * * The rates from New Orleans to Chicago and related points have been fixed by the single-line rates of the Illinois Central and are lower than to points in central territory. * * * (Rec. 13.)

In connection with the matter under consideration here, the Commission in its report of July 1, 1924, in *Western Paper Makers' Chemical Company* v. *Director General, as Agent, et al.*, 91 I. C. C. 223, said:

> * * * It appears that the Illinois Central by its single-line route controls the rates from New Orleans to Chicago and hence to Milwaukee, and that other carriers serving New Orleans and the other Gulf ports meet the New Orleans-Chicago rate so made. * * * (Rec. 47.)

In the latter case the Commission found to be neither unreasonable nor unjustly discriminatory the rates on rosin in carloads from southern points

of origin east of the Mississippi River to Kalamazoo and Grand Rapids. (Rec. 41–47.)

Concerning the influence of the Illinois Central rates the lower court, among other things, said:

> * * * The rates from New Orleans to Chicago had been fixed by the single-line rates of the Illinois Central, and were lower than to other points in Central territory. (Rec. 54.)

For the reasons above set forth we insist that the appeal in this case should be dismissed.

Respectfully submitted.

P. J. FARRELL,
E. M. REIDY,
For Interstate Commerce Commission,
Appellee.

MARCH, 1926.

○

No. [redacted] 812

In the Supreme Court of the United States

October Term, [redacted] 1925

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In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 982

WESTERN PAPER MAKERS' CHEMICAL COMPANY, A CORPORATION, AND TANGLEFOOT COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN

SUGGESTIONS IN OPPOSITION TO APPELLANTS' MOTION FOR DIMINUTION OF RECORD FOR PRINTING

In all of that territory lying south of Tennessee and east of the Mississippi River to and including both of the Carolinas naval stores (rosin and turpentine) are produced and shipped therefrom into all of that territory lying west of the Buffalo-Pittsburgh line and to and even beyond the Mississippi River.

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That Southern territory is divided by the line of the Louisville & Nashville from Decatur, Ala., to Pensacola, Fla. The territory lying to the east of that line is known as Southeastern territory and the territory lying west is known as Mississippi Valley territory.

By tariffs to become effective between September 1, and October 1, 1923, the carriers operating in those territories proposed "a comprehensive revision of the rates on naval stores from all points of production." (87 I. C. C. 740.)

After extensive hearings, the rates found reasonable from Jacksonville and New Orleans, representative points in the respective origin groups, to destinations and considered in the Supplemental Report, are as follows (91 I. C. C. 226):

To—	From Jacksonville	From New Orleans
	Cents	*Cents*
Chicago	40	37
Kalamazoo	40	39
Milwaukee	42	39
Detroit	40	40
Grand Rapids	41	40

Under this adjustment the rate from the Southeast to Kalamazoo will be the same as to Chicago and Detroit, and the rate to Grand Rapids will be 1 cent less than to Milwaukee. From the Gulf ports and Mississippi Valley territory the rate to Kalamazoo will be 2 cents higher than to Chicago, and the rate to Grand Rapids will be 1 cent higher than to Milwaukee. (91 I. C. C. 226.)

The Commission found that Western Paper Makers' Chemical Company "and the manufacturer at Milwaukee now have a division of territory of distribution, and are no longer competitors." (91 I. C. C. 224.)

In establishing these slight differentials the Commission considered that the Illinois Central by its single-line route controls the rates from New Orleans to Chicago and hence to Milwaukee, and that other carriers serving New Orleans and the other Gulf ports meet the New Orleans-Chicago rate so made. (91 I. C. C. 226.) The routes to Grand Rapids and Kalamazoo are less direct and embrace two or more carriers.

Tanglefoot Company and Western Paper Makers' Chemical Company are located at Grand Rapids and Kalamazoo, respectively.

Conceiving themselves aggrieved by this order of the Commission, appellants filed the original bill in the District Court at Grand Rapids and, *inter alia*, alleged "that there was no substantial evidence supporting the findings of the Interstate Commerce Commission and that such findings were contrary to the indisputable character of such evidence as was produced."

The United States and the Commission filed separate answers and denied generally and specifically this and similar allegations. (*Chicago Junction Case*, 264 U. S. 258.)

Counsel for the appellants procured a certified transcript of the entire record of the evidence and

proceedings before the Commission and offered the same on the hearing of the application for interlocutory injunction before Circuit Judges Denison and Knappen and District Judge Sessions. In their opinion the court say, "The entire record before the Commission is in evidence here." (App. Mo. p. 13.)

With a full opinion on the merits the learned District Court denied application for interlocutory injunction. After stipulation of the parties to submit the cause for final hearing, the District Court dismissed the bill on final decree. The appeal was then taken.

Without any attempt at diminution of the record, under Section 2 of the Commerce Court Act (36 Stat. 542), opposing counsel procured an order from the District Court directing "the original record to be transmitted on appeal instead of a transcript thereof."

In this Court the first point on which the appellants rely is that there was no evidence before the Commission on which to fix the through rate on rosin from points of origin to the cities of Grand Rapids and Kalamazoo. (App. Mo. p. 6.) To maintain that proposition, opposing counsel filed a designation for printing from which the transcript of the record before the Commission was excluded but in which certain excerpts therefrom were included. (App. Mo. p. 7.) Counsel for the appellees thereupon designated for printing the remainder of the transcript of the record. (App. Mo.

p. 21.) Counsel for the Government and the Commission did not designate the remainder of the transcript until after counsel for appellants designated only such portions thereof as in his judgment "would seem to be sufficient to raise the questions necessary for consideration." (App. Mo. p. 21.)

Counsel for appellants does not question the reasonableness of the estimate of the cost of printing as submitted by the Clerk, but claims that the cost is too heavy for his clients to bear.

Opposing counsel, therefore, is unwilling to print the material which he himself procured and offered before the District Court and had transmitted in its original form to this Court without any suggestion whatever that a diminution thereof should be made. Moreover, the Interstate Commerce Commission has itself reduced the record to narrative form, and he declines to accept that, because, he says, "The witnesses introducing as part of their testimony prolix schedules and maps, few if any of them, relating to the through freight rate on rosin; having to do in many instances with rates on other commodities." (App. Mo. p. 22.) His statement that many of the exhibits have "to do in many instances with rates on other commodities" is an argument against appellants as the Commission had the right to make comparisons.

Counsel for appellants states that counsel for the appellees "have submitted an agreed narrative form of the questions and answers given by

the witnesses on the oral hearing before the Interstate Commerce Commission" (App. Mo. p. 21), which embraces 361 pages, and while he is willing to pay for the printing of that he is unwilling to pay for the printing of the exhibits which were identified by this testimony and are a part of it.

Counsel for appellants further says—

> All of the matters that were before the Interstate Commerce Commission itself are on file in the office of the clerk of the Supreme Court, and at any time are available both to the court and counsel (App. Mo. p. 23.)

and—

> we are willing to stand on that here in this court, that the opinions of the Interstate Commerce Commission giving effect to the order of which complaint is made, show on their face that there was no substantial evidence before the Commission (App. Mo. p. 22),

and—

> So far as the appellants are concerned, they are willing to pledge themselves to confine their argument on appeal to the facts set out in the opinions of the Interstate Commerce Commission and the District Court of the Western District of Michigan * * *. (App. Mo. p. 22.)

It is difficult to reconcile these statements with the course of counsel in offering before the District Court the transcript of the Commission's

record, later transmitting it in its original form to this Court, and then designating therefrom "the part which would seem to be sufficient to raise the questions necessary for consideration." Nor are these statements in accord with the prayer of the motion, viz:

> Wherefore the appellants pray that an order may be made for a diminution of the record on printing, and that such order shall provide that the printed record shall contain the following: The pleadings; the opinions and decrees of the District Court, together with the orders of the Interstate Commerce Commission concerning said through freight rate on rosin; *with leave to either party in their oral arguments, or in their printed briefs, to set out or refer to any special portion of the certified copy of the proceedings before the Interstate Commerce Commission;* that such other and further order may be entered on this motion as to the court may seem just and proper. (App. Mo. pp. 4, 5.)

Obviously on an allegation and argument that there was no substantial evidence to sustain the findings of the Commission the court and counsel are entitled to the entire record, in either original or narrative form, upon which the findings were made. *Chicago Junction Case, supra; Northern Pacific Railway Co.* v. *The Department of Public Works of Washington, et al.*, No. 371, Supreme Court, October Term, 1924, decided April 13, 1925:

Kansas City, Mexico & Orient Division's Case, 265 U. S. 274; *New England Divisions Case*, 261 U. S. 184; *Louisiana & Pine Bluff Railway Co. v. United States*, 257 U. S. 114; *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88.

Counsel for appellants should either cooperate with the Commission to the end that a reduced record may be agreed upon, or he should abandon his point that there was no evidence before the Commission upon which to base its findings.

Respectfully submitted.

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